Supreme Court, U.S.
FILED

041075 FEB 7 2005

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

TONY ESENWAH, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TIMOTHY E. WICHMER
Counsel of Record
BERNHARDT & WICHMER, PC
165 N. Meramec Ave.
Suite 430
Clayton, MO 63105
(314) 863-1212
(314) 863-3896 fax
Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

I. Whether, in contravention of precedent, the Court erred in failing to consider the totality of evidence of Esenwah's persecution when it affirmed the order of the Board of Immigration Appeals (BIA) finding that Esenwah failed to establish persecution on a statutorily protected ground, religion.

II. Whether, given the evidence of record, the Court's order affirming the finding that Esenwah failed to establish that his father was not executed due to his religious beliefs was in contravention of *INS v. Elias-Zacarias.*

III. Whether the Court's deference to the BIA's finding that Esenwah failed to demonstrate a nexus between his persecution and statutory ground, particular social group, was in contravention of *INS v. Elias-Zacarias* and other precedent as Esenwah did not bear the bear the burden of proving with absolute certainty the exact motivation of his persecutors.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 9

A. IN CONTRAVENTION OF PRECEDENT, THE COURT ERRED IN FAILING TO CONSIDER THE TOTALITY OF EVIDENCE OF ESENWAH'S PERSECUTION WHEN IT AFFIRMED THE ORDER OF THE BOARD OF IMMIGRATION APPEALS (BIA) FINDING THAT ESENWAH FAILED TO ESTABLISH PERSECUTION ON A STATUTORILY PROTECTED GROUND, RELIGION. 9

B. GIVEN THE EVIDENCE OF RECORD, THE COURT'S ORDER AFFIRMING THE FINDING THAT ESENWAH FAILED TO ESTABLISH THAT HIS FATHER WAS NOT EXECUTED DUE TO HIS RELIGIOUS BELIEFS WAS IN CONTRAVENTION OF *INS V. ELIAS-ZACARIAS* 10

C. THE COURT'S DEFERENCE TO THE BIA'S FINDING THAT ESENWAH FAILED TO DEMONSTRATE A NEXUS BETWEEN HIS PERSECUTION AND STATUTORY GROUND, PARTICULAR SOCIAL GROUP, WAS IN CONTRAVENTION OF *INS V. ELIAS-ZACARIAS* AND OTHER PRECEDENT AS ESENWAH DID NOT BEAR THE BEAR THE BURDEN OF PROVING WITH ABSOLUTE CERTAINTY THE EXACT MOTIVATION OF HIS PERSECUTORS. 12

CONCLUSION 15

APPENDIX

CIRCUIT COURT ORDER (08/05/04) 1a

BOARD OF IMMIGRATION APPEALS ORDER (02/27/03) 9a

ORDER DENYING REHEARING (11/09/04) 11a

TABLE OF AUTHORITIES

Page

CASES

AGUILERA-COTA V. INS, 914 F.2D 1375 (9TH CIR. 1990) 12

CHAND V. INS, 222 F.3D 1066 (9TH CIR. 2000) 9

FELEKE V. INS, 118 F.3D 594 (8TH CIR. 1997) 11

HAGI-SALAD V. ASHCROFT, 359 F.3D 1044 (8TH CIR. 2004) 13

INS V. ELIAS-ZACARIAS, 502 U.S. 478 (1992) ..... *passim*

MATTER OF FUENTES, 19 I&N DEC. 658. 662 (BIA 1988) 12

MATTER OF H- 21 I&N DEC. 337, 343 (BIA 1996) 11, 13

MATTER OF S-P- 21 I&N DEC. 486, 489-90 (BIA 1996) 13

NYONZELE V. INS, 83 F.3D 975 (8TH CIR. 1996) 9

MISCELLANEOUS

8 U.S.C. §1101 9

8 U.S.C. 1101(a)(42) 2

8 U.S.C. 1158 3

8 U.S.C. 1158(b) 2

8 U.S.C. 1231(b)(3) 2, 3

8 U.S.C. 1252 6

PETITION FOR WRIT OF CERTIORARI

Tony Esenwah, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Eighth Circuit entered in this case on August 5, 2004 and November 9, 2004, respectively.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals is unreported is attached hereto at Appendix (App.) p. 9a. The opinion of the Eighth Circuit Court of Appeals on the merits, which is sought hereby to be reviewed, is reported at 378 F.3d 763 and is attached hereto at App. p. 1a. The order of the Eighth Circuit denying the petition for panel rehearing in such case is unreported and is attached hereto at App. p. 11a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (App. p.1a) was entered on August 5, 2004. A timely petition for panel rehearing was denied on November 9, 2004 (App. p. 11). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(c), in that the Eighth Circuit has decided an important question of federal law that conflicts with relevant decisions of this Court.

STATUTORY PROVISIONS INVOLVED

Section 101(a)(42) of the INA; 8 USC 1101(a)(42) provides in pertinent part:

> The term "refugee" means
>
> > (A) any person who is outside any country of such person's nationality... and is unable or unwilling to...that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....

Section 208(b) of the INA; 8 USC 1158(b) provides in pertinent part:

> (b) Conditions for Granting Asylum.--
>
> > (1) In general– The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

Section 241(b)(3) of the INA; 8 USC 1231(b)(3) provides in pertinent part:

(3) Restriction on removal to a country where alien's life or freedom would be threatened.–

(A) In general– ... the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT OF THE CASE

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA" or "Board") and the Eighth Circuit Court of Appeals finding him removable from the United States and denying him political asylum under INA 208, 8 USC 1158, and withholding of removal under INA 241(b)(3), 8 USC 1231(b)(3).

(ii) Proceedings at the Immigration and Naturalization Service

Tony Esenwah is a native and citizen of Nigeria who was admitted to the United States as a student on August 30, 1981. He remained in the country after the expiration of his student visa. In 1993, he affirmatively applied for asylum with the Immigration and Naturalization Service (INS). In 1998, his application

was referred to the Immigration Court by the Asylum Officer. On the basis of the foregoing, on April 27, 1998, he was issued a Notice to Appear in which he was charged with removability pursuant to § 237(a)(1)(C)(i) of the INA, as an alien who failed to maintain or comply with the conditions of the non-immigrant status in which admitted. Esenwah conceded removability and sought relief from removal in the forms of asylum, withholding of removal, and, in the alternative, voluntary departure. He submitted an application for these reliefs along with supporting evidence and documentation. An individual hearing on these reliefs was held in St. Louis, Missouri, on February 4, 1999. That same date, the IJ issued an oral order, subsequently transcribed as a written order, denying Esenwah's request for asylum and withholding of removal, and granting him 60 days of voluntary departure.

(iii) Proceedings at the Board of Immigration Appeals

On February 15, 1999, Esenwah timely appealed the decision of the IJ to the BIA. Following transcription of the proceedings below, Esenwah was allotted until July 7, 1999 to submitted an appeal brief. He submitted the brief to the BIA on June 30, 1999, arguing for reversal of the decision of the IJ denying asylum and withholding of removal. The INS submitted a response brief on August 5, 1999. On September 27, 2002, the BIA dismissed the appeal, granting Esenwah 30 days to voluntarily depart the United States. On October 24, 2002, Esenwah filed a Motion to Reconsider & Motion to Stay Removal with the BIA. The BIA denied the Motion on February 27,

2003.

Esenwah sought timely review of the BIA's decision in the Eighth Circuit on March 25, 2003. The Court denied the petition on August 5, 2004. After a timely filed motion for rehearing was also denied, the Court issued its order affirming Esenwah's removal on November 9, 2004.

(iv) Statement of Facts

Esenwah's asylum claim is based on persecution on account of his religion and tribal membership. Esenwah was born in Bida, Nigeria on April 15, 1954. He is a member of the Ibo tribe. He was baptized and confirmed in the Catholic Church. Christians were the minority in Bida. They suffered persecution at the hands of Muslims who were engaged in a Jihad aiming to either convert or expel Christians from the area. As evident in the record, Esenwah suffered several events which amount to persecution because of his religion and membership in a particular social group.

First, at the age of 16, Esenwah, his father, younger sister, and other villagers were forcibly taken from their home by eight Muslim Nigerian soldiers during a jihad. Esenwah and his sister were subject to physical beatings, cursing and spitting by government soldiers. Esenwah's father was executed by the soldiers within Esenwah's earshot. After the execution Esenwah and his sister continued to be detained and abused for several days. Upon release from detention, Esenwah was sent to live with his uncle in the Southern Nigeria in the town of Ibadan. Christians were also a minority in Ibadan.

Over the course of the next several years Esenwah fell victim to several acts of harassment and intimidation which were perpetrated by Muslims. Esenwah was targeted specifically because of his Christian faith.

In 1981, Esenwah received a student visa to attend school in the United States. During his stay in the United States, he learned of the death of his uncle, the Reverend Michael Esenwah, who, while on a missionary journey in Northern Nigeria was ambushed and murdered by Muslim militants. Realizing that country conditions for Christians had not improved in Nigeria, Esenwah applied for asylum in the United States in 1993. To date, Esenwah continues to fear that if he is forced to return to Nigeria he will be arrested, interrogated, tortured and possibly executed because of his faith, association with the Christian Esenwah family, and his membership in the Ibo tribe.

(v) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction was proper to the Eighth Circuit Court of Appeals pursuant to section 242 of the INA; 8 USC 1252. Venue was proper in the Eighth Circuit under the same statute in that the judicial proceedings were completed by the Immigration Judge sitting in St. Louis, MO in the Eighth Circuit.

The jurisdiction of this Court on application for writ of certiorari is invoked under U.S. Supreme Court Rule 10(c) as set forth above. That is, the petition for certiorari will present a substantial question, for the reason that the Eighth Circuit has decided an

important question of federal law that conflicts with relevant decisions of this Court. This proceeding involves questions of exceptional importance regarding establishment of the nexus between persecution and a statutorily protected ground and the requisite burden of proof.

It is in conflict with *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) which holds that an alien is only required to provide some evidence, rather than direct proof, of his persecutor's motives. The Court erred in holding Petitioner to a higher standard. Specifically, the Court made the following three errors of law:

> I. In contravention of precedent, the Court erred in failing to consider the totality of evidence of Esenwah's persecution when it affirmed the order of the Board of Immigration Appeals (BIA) finding that Esenwah failed to establish persecution on a statutorily protected ground, religion.
>
> II. Given the evidence of record, the Court's order affirming the finding that Esenwah failed to establish that his father was not executed due to his religious beliefs was in contravention of *INS v. Elias-Zacarias*.
>
> III. The Court's deference to the BIA's finding that Esenwah failed to demonstrate a nexus between his persecution and statutory ground, particular social group, was in

> contravention of *INS v. Elias-Zacarias* and other precedent as Esenwah did not bear the bear the burden of proving with absolute certainty the exact motivation of his persecutors.

Approximately 200 aliens, a large majority of whom are asylum applicants, seek review each year in the Eighth Circuit. Failure to properly address the foregoing issues will negatively impact those applicants who legitimately fear persecution upon removal from the United States. A case of this magnitude deserves review by the Supreme Court.

In its decision, the Court first found that it had jurisdiction to review the appeal from the BIA's order denying the motion for reconsideration, thereby rejecting the government's argument the contrary. Then, citing the Immigration Judge's finding that the Petitioner's father was killed as a result of political and ethnic conflict, rather than particularized persecution, the Court affirmed the BIA's adoption of that finding, deeming it well-articulated, based on the record, and lacking evidence of discriminatory intent. Finding that Esenwah did not develop a nexus between the persecution he suffered and his tribal membership at the hearing before the immigration judge, the Court also rejected Esenwah's claim that the BIA did not properly consider the possibility that he suffered persecution based on that tribal membership.

REASONS FOR GRANTING THE PETITION

A. In contravention of precedent, the Court erred in failing to consider the totality of evidence of Esenwah's persecution when it affirmed the order of the Board of Immigration Appeals (BIA) finding that Esenwah failed to establish persecution on a statutorily protected ground, religion.

In order to qualify for a discretionary grant of asylum, the claimant must show he meets the statutory definition of "refugee" under 8 U.S.C. §1101 (a)(42)(A). This provision states that a refugee is a person who is unable or unwilling to return to his or her country because of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion."

In evaluating Esenwah's argument that both the IJ and the BIA failed to recognize that he was persecuted because of this religion, the Court simply found that the BIA was reasonable in deciding that Esenwah failed to show that his father was executed by government soldiers because of his religion. While treatment of family members is certainly relevant to the question of persecution, it is not dispositive as to an individual's claim. *Nyonzele v. INS*, 83 F.3d 975, 983 (8th Cir. 1996). Persecution must be considered cumulatively. *Chand* v. *INS*, 222 F.3d 1066, 1074 (9th Cir. 2000). Here, the execution of Esenwah's father serves as only one facet of Esenwah's persecution, which must be viewed in conjunction with the individual treatment of Esenwah himself.

As a child, Esenwah was constantly harassed, physically abused, and jeered at by Muslims on account of his Christianity. The uncontroverted evidence of record demonstrates that on September 28, 1970, Esenwah, his father and sister were singled-out as Christians and detained by Nigerian Muslim soldiers. In detention, Esenwah was blindfolded, beaten, spat upon and kicked by Nigerian soldiers. This abuse lasted for 2-3 days. Thereafter, he moved to Southern Nigeria in an attempt to escape further harm. The attempt proved futile. From the time of his relocation to Ibadan until he departed for the United States, Esenwah was continually harassed, beaten and discriminated against at the hands of Muslims on account of his Christianity. The Court erred in finding that the BIA did not abuse its discretion in declining to revisit the determination that Esenwah did not suffer persecution on account of religion where the Panel failed to consider the totality of evidence regarding Esenwah's persecution and instead based its finding on solely on one incident of persecution, his father's death.

B. Given the evidence of record, the Court's order affirming the finding that Esenwah failed to establish that his father was not executed due to his religious beliefs was in contravention of *INS v. Elias-Zacarias*.

In denying the Petition for Review, this Court highlighted the Immigration Judge's findings that Esenwah "failed to show government soldiers executed his father because of religion," and that instead the murder was a "likely offshoot of Nigerian's Biafran civil war in 1970." The Court correctly assessed that a showing of generalized unrest and conflict is not enough

to show particularized persecution. *Feleke v. INS*, 118 F.3d 594, 598 (8th Cir. 1997). However, like the BIA, the Court overlooked the uncontroverted evidence of record demonstrating that the only individuals who were forcibly apprehended, detained, beaten and harassed in Esenwah's predominately Muslim town were Christians, that solely Christian men were executed, and that the perpetrators of these heinous acts were Muslim Nigerian Soldiers.

The Supreme Court has held that an alien need not prove "direct proof of his persecutors' motives" but instead "some evidence of it, direct or circumstantial." *Elias-Zacarias*, 502 U.S. at 483. The evidence of record, both direct and circumstantial, does not support a finding that Esenwah's father was murdered as a result of general civil upheaval. Rather it demonstrates that the motive for his murder was specific, his Christian faith. Such mistreatment of an individual of a specific faith by government agents easily falls with the purview of asylum eligibility, regardless of whether such persecution occurs during a time of peace or of civil strife. *See Matter of H-* 21 I&N Dec. 337, 343 (BIA 1996) (finding while inter-clan violence may constitute civil strife, this does not preclude certain types of harms from constituting persecution).

C. The Court's deference to the BIA's finding that Esenwah failed to demonstrate a nexus between his persecution and statutory ground, particular social group, was in contravention of *INS v. Elias-Zacarias* and other precedent as Esenwah did not bear the bear the burden of proving with absolute certainty the exact motivation of his persecutors.

The Court erred in rejecting Esenwah's claim that the BIA did not properly consider the possibility that he suffered persecution based on his Ibo tribal membership. The Court first cited the Immigration Judge's observation that the murder of Esenwah's father could have been motivated either by animus toward Ibo tribesmen or an individual soldier's decision to retaliate against Ibo tribe members. However, it then dismissed this possibility stating that Esenwah failed to develop this claim before the IJ, and as a result, found that no nexus existed between Esenwah's persecution and his tribal affiliation. In so doing, the Court ignored established policy and precedent. It is recognized that, "a failure to state each and every ground for a claim of political asylum at the time of the initial application should not prejudice that claim..." *Aguilera-Cota v. INS*, 914 F.2d 1375, 3182 (9th Cir. 1990). Moreover, an applicant is not expected to provide direct proof of his persecutor's motives. *Elias-Zacarias*, 502 U.S. at 483; *Matter of Fuentes*, 19 I&N Dec. 658. 662 (BIA 1988)(holding that "an applicant does not bear the unreasonable burden of establishing exact motivation of a 'persecutor' where different reasons for actions are possible.")

Rather, an applicant must provide some evidence, direct or circumstantial, of motive. *Elias-Zacarias, supra; Matter of S-P-* 21 I&N Dec. 486, 489-90 (BIA 1996)("an asylum applicant bears the burden of establishing facts on which a reasonable person would fear that the danger arises on account of his race, religion, nationality, membership in a particular social group, or political opinion."). Moreover, it is well-settled that membership in a Somali clan can constitute membership in a "particular social group" for purposes of deciding eligibility for asylum when the members of the group share ties of kinship and linguistic commonalities. *Hagi-Salad v. Ashcroft*, 359 F.3d 1044, 1046 (8th Cir. 2004); *Matter of H*, 21 I&N Dec. 337, 342-43 (BIA 1996). Esenwah's Christian Ibo tribe is akin to a Somali clan. However, he did not bear the burden of proving conclusively that his persecution was because of his membership in this social group but rather he was required to present some evidence that it could have been on account of such membership. *See Elias-Zacarias, supra.*

Esenwah met his burden of proof. He presented various documents demonstrating the interplay between religious and tribal affiliation and substantiating his claim that Ibo Christians are persecuted in Nigeria. As case in point, he presented the Department of State (DOS) report which notes that ethnic, regional, and religious conflicts plague all parts of Nigeria. R. 42. The DOS also recognizes the overlap between religion and ethnicity in Nigeria, stating that:

> [r]eligious differences often correspond to regional and ethnic differences ... consequently at times it is

> difficult to distinguish religious discrimination and tension from ethnic and regional discrimination and tension, which are pervasive. Religious tensions underscored what were predominately ethnic confrontations throughout the year.

R. 58.

Further, in reporting the death of 32 people in a Muslim-Christian clash in Northern Nigeria, the St Louis Post Dispatch stated that the country "frequently suffers violent, religious, ethnic and regional disputes." R. 66. Esenwah presented direct and credible evidence that the Christian Ibo are the targets of such disputes. For example, Muslims in the city of Kaduna targeted the "substantial Christian Ibo population" during a pro-Sharia demonstration, forcing them to flee for safety. R. 70. Indeed, since the 1980's approximately six thousand people, most of whom were Christians, have been killed in clashes in Nigeria. R. 274. Atrocities against Christians are a daily occurrence in Nigeria. R. 464, 467, 517, 531, 537, 570, 609-610, 615. A majority of these Christians are Ibo, the largest tribe in Southern Nigeria. R. 70, 182-3, 256. Thus, given that the record is replete with documents citing persecution of Christians and Ibo in Nigeria, Esenwah met his requisite burden of proving that he was persecuted due to his religion and/or tribal affiliation. In holding to the contrary, the BIA abused its discretion. Likewise, the Eighth Circuit erred by affirming the BIA's determination.

CONCLUSION

Therefore, Petitioner respectfully prays that this Court grant this petition for writ of certiorari, reverse the decisions of the Eighth Circuit Court of Appeals and the BIA, hold that the Petitioner is eligible for political asylum and withholding of removal, and for all other just and proper relief.

Respectfully submitted,

Timothy E. Wichmer
Counsel of Record
Bernhardt & Wichmer, PC
165 N. Meramec Ave.
Suite 430
Clayton, MO 63105
314-863-1212
314-863-3896 fax
Attorneys for the Petitioner

(Any footnotes trail end of each document)

No. 03-1785

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Tony Esenwah,
Petitioner,

v.

John D. Ashcroft, Attorney General
of the United States,
Respondent.

February 12, 2004, Submitted
August 5, 2004, Filed

COUNSEL: For TONY ESENWAH, Petitioner: Rachel Elizabeth Groneck, LAW OFFICES OF SUZANNE BROWN, St. Louis, MO.

For JOHN D. ASHCROFT, Attorney General of the United States, Respodent: Jane Rund, U.S. ATTORNEY'S OFFICE, St. Louis, MO. David M. McConnell, Michele Y.F. Sarko, Emily Anne Radford, Papu Sandhu, Aviva L. Poczter, U.S. DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, DC. Julia K. Doig, U.S. DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, DC.

JUDGES: Before LOKEN, Chief Judge, BOWMAN and WOLLMAN, Circuit Judges.

OPINION BY: BOWMAN

OPINION: BOWMAN, Circuit Judge.

Tony Esenwah, a native and citizen of Nigeria, appeals from a Board of Immigration Appeals (BIA) order denying his motion for reconsideration of the BIA decision affirming the order of an Immigration Judge (IJ) denying Esenwah's claim for asylum and ordering him removed from the United States. We affirm the denial of his motion for reconsideration.

Esenwah, a member of the Ibo tribe and a Christian, was born in Bida, Nigeria, where Christians are a minority. Esenwah lived in Bida until 1970, when he was sixteen years old. At that point, tragedy struck: government soldiers took Esenwah, his ten-year old sister, and his father from their home into the bush; Esenwah and his sister were blindfolded while the soldiers executed his father at gunpoint. Shortly thereafter, the soldiers released Esenwah and his sister, and Esenwah went to live with his maternal uncle in Ibadan, Nigeria. In 1981, Esenwah received a student visa and entered the United States. Esenwah never attended college, overstayed his visa, and in 1993 applied for asylum, claiming religious persecution. In turn, in 1998 the Immigration Service initiated removal proceedings. The IJ held a hearing in February 1999, denied Esenwah's asylum application, and granted him voluntary departure to the United Kingdom. In the event the United Kingdom were to fail to accept Esenwah, the IJ ordered Esenwah's removal to Nigeria. Esenwah appealed to the BIA, which in September 2002 affirmed the IJ's decision and dismissed Esenwah's appeal. Esenwah filed a timely

motion for reconsideration, which the BIA denied. Esenwah appeals from the BIA decision to deny his motion for reconsideration, but has not appealed the BIA's original decision affirming the IJ's order. We have granted Esenwah's unopposed motion for a stay of removal during the pendency of this appeal.

This Court has jurisdiction to review all final orders of removal, including motions for reconsideration of a previous decision by the BIA. 8 U.S.C. § 1252 (b)(2) (2000); De Jimenez v. Ashcroft, 370 F.3d 783, 789 (8th Cir. 2004). n1 Despite the statutory grant of jurisdiction, the government urges that we do not have jurisdiction to review the claims raised in Esenwah's motion for reconsideration because any review of this motion would require us to review arguments identical to those made during the underlying asylum determination. The government argues that this type of review, when only a motion for reconsideration is before this Court, would violate the Supreme Court's decision in Stone v. I.N.S., 514 U.S. 386, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995).

The Supreme Court in Stone v. INS resolved a circuit split and held that a motion for reconsideration of a BIA decision affirming an IJ's denial of asylum did not extend the time for appealing the underlying decision to a federal court of appeals. 514 U.S. at 389-90. The Court held that the appeal of the BIA order affirming the IJ's order and the appeal of the denial of the motion for reconsideration must be treated as "two separate petitions filed to review two separate final orders." Id. at 405. The government would have us read Stone as requiring that we dismiss for lack of jurisdiction an appeal from the denial of a motion for reconsideration

that alleges the same errors considered by the BIA in reaching its decision to affirm the denial of asylum when, as here, no appeal of the BIA's underlying asylum decision has been filed. The government argues that in these circumstances review of the denial of the motion for reconsideration would be an improper exercise of jurisdiction over the original order affirming the denial of asylum. We disagree with the government's strained reading of Stone and we reject the government's argument.

In the first place, Congress has vested us with jurisdiction to review appeals from BIA orders denying motions for reconsideration, and we are duty-bound to exercise that jurisdiction. See New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989). No federal court, not even the Supreme Court, can or would find a lack of subject-matter jurisdiction with respect to matters as to which a federal statute confers such jurisdiction. Here 8 U.S.C. § 1252(b)(2) is the jurisdiction-conferring statute; this statute grants to the federal courts of appeals jurisdiction over "orders of removal." As De Jimenez explains, an order denying a motion for reconsideration is an order of removal. De Jimenez, 370 F.3d at 789. A secondary point to note in connection with the jurisdictional argument is that we review orders denying motions for reconsideration under the abuse-of-discretion standard. Boudaguian v. Ashcroft, 376 F.3d 825, 2004 U.S. App. LEXIS 15167, No. 02-4094, 2004 WL 1630961, at *2 (8th Cir. July 22, 2004); Perwolf v. INS, 741 F.2d 1109,1110 (8th Cir. 1984). This standard is considerably more deferential than the ordinary administrative-law standard that governs our review of agency decisions. See e.g., Habtemicael v.

Ashcroft, 370 F.3d 774, 779 (holding on appeal of a BIA decision denying asylum that we review factual determinations for substantial evidence and legal determinations de novo). In contrast, the BIA abuses its discretion only when its decision "is without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the alien or distorts important aspects of the claim." Feleke v. INS, 118 F.3d 594, 598 (8th Cir. 1997). Any other level of review would "encourage aliens to improperly prolong the removal process by filing motions to reconsider, instead of petitioning for immediate judicial review of an initial adverse decision." Boudaguian, 2004 U.S. App. LEXIS 15167, 2004 WL 1630961 at *2.

"A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority." 8 C.F.R. § 1003.2(b)(1)(2004). By its very nature, a motion for reconsideration alleges defects of some sort in the underlying decision by the BIA. Though our review is only for abuse of discretion, a proper review under the abuse-of-discretion standard of denials of motions for reconsideration ordinarily requires some review of the underlying decision. A review of the denial of a motion for reconsideration does not mean the court has exercised jurisdiction over the BIA's underlying asylum decision. See De Jimenez, 370 F.3d at 789 ("Although we are not directly reviewing the BIA's order. . ., our review of the denial of the motion to reconsider may require us to consider the validity of that order."). The orders remain separate and distinct. See Stone, 514 U.S. at 405. n2

We now turn to the substance of Esenwah's appeal. The first, and determinative, claim we address is Esenwah's argument that the BIA abused its discretion when it did not revisit its previous determination that Esenwah had not suffered persecution based on a statutorily protected ground. In order to qualify for a discretionary grant of asylum, the claimant must show he meets the statutory definition of "refugee" under 8 U.S.C. § 1101(a)(42)(A), which states that a refugee is a person who is unable or unwilling to return to his or her country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." See also, 8 U.S.C. § 1158(b)(1) (2004) (allowing the Attorney General to grant asylum to refugees). In denying asylum, the IJ held that Esenwah failed to show that the government soldiers executed his father because of his religion. The IJ found that Esenwah himself testified that his father's killing was likely an offshoot of Nigeria's Biafran civil war in 1970. (Oral Decision of the Immigration Judge, at 6); see Feleke, 118 F.3d at 598 (a showing of political unrest and ethnic conflict is not enough to show particularized persecution). The BIA specifically noted this finding of the IJ in the BIA's affirmance of the denial of asylum and in its subsequent refusal to reconsider its ruling. The decision by the BIA is well-articulated, based on the record, evinces no discriminatory intent, and does not distort any of Esenwah's claims. We therefore find that the BIA did not abuse its discretion in making the challenged determination.

Similarly, we reject Esenwah's claim that the BIA did not properly consider the possibility that Esenwah

suffered persecution based on his tribal membership. The IJ made the observation that "this killing could have been motivated by tribal hatreds or an individual soldier's decision to retaliate against Ibo tribesmen wherever they found them." (Oral Decision of the Immigration Judge, at 6). Aside from this remark by the IJ, Esenwah offers no support for his tribal membership claim. Esenwah failed to develop this claim at the hearing before the IJ. We conclude that the BIA's finding that Esenwah had not provided a nexus between the persecution suffered and his tribal membership cannot be considered an abuse of discretion.

We need not reach Esenwah's other arguments, inasmuch as they are rendered moot by the lack of a nexus between the persecution Esenwah suffered and a statutorily protected basis. For example, without the requisite nexus Esenwah does not fit the statutory term "refugee" and thus is not eligible for a discretionary grant of asylum. INS v. Elias-Zacarias, 502 U.S. 478, 481, 117 L. Ed. 2d 38, 112 S. Ct. 812 (1992). Similarly, without the requisite nexus, it is of no moment whether the BIA abused its discretion by failing to reconsider the finding that Esenwah would not suffer country-wide persecution, or by failing to recognize Esenwah's past persecution as entitling him to a grant of humanitarian asylum as found in Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989).

The order of the BIA denying the motion for reconsideration is affirmed.

Footnotes

n1 We note there is an exception for final orders of removal against aliens who are removable by reason of having committed certain criminal offenses; review of such orders is precluded by 8 U.S.C. § 1252(a)(2)(C) (2000).

n2 Our decision in Boudaguian v. Ashcroft, 2004 U.S. App. LEXIS 15167, No. 02-4094, 2004 WL 1630961 (8th Cir. July 22, 2004), is illustrative. In Boudaguian we found the BIA did not abuse its discretion in denying a motion for reconsideration that raised arguments identical to those considered in the original asylum determination. We did not dismiss the appeal for lack of jurisdiction, but rather held that the abuse-of-discretion standard was necessary to preserve the distinct nature of the appeal of a denial of a motion for reconsideration from an appeal of an underlying denial of asylum. Boudaguian, 2004 U.S. App. LEXIS 15167, 2004 WL 1630961 at *3.

U.S. Department of Justice
Executive office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-045-802 – CHICAGO

In re: ESENWAH, TONY UCHE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Brown, Suzzane

Date: February, 27, 2003

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 3.2 to reconsider our decision dated September 27, 2002. In our previous decision we dismissed the respondent's appeal from the Immigration Judge's denial of the application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act. The respondent has filed a motion to reconsider that decision. We have reviewed the arguments made by the respondent in his motion and note that we considered these arguments before rendering a decision in this case. We decline to revisit them. Moreover, to the extent that the respondent did not suffer past persecution, this is an incorrect interpretation of our

decision. In our previous decision, we affirmed the Immigration Judge's finding that the respondent was not a victim of past persecution on account of a statutorily protected ground. More specifically, we agreed with the Immigration Judges decision finding no nexus between the respondent's persecution and his religious beliefs. See I.J. at 5, 8. Accordingly, the motion is denied.

/s/
FOR THE BOARD

No. 03-1785

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Tony Esenwah,
Petitioner,

v.

John D. Ashcroft, Attorney General
of the United States,
Respondent.

November 9, 2004, Decided

COUNSEL: For TONY ESENWAH, Petitioner: Rachel Elizabeth Groneck, LAW OFFICES OF SUZANNE BROWN, St. Louis, MO.

For JOHN D. ASHCROFT, Attorney General of the United States, Respodent: Jane Rund, U.S. ATTORNEY'S OFFICE, St. Louis, MO; David M. McConnell, Michele Y.F. Sarko, Emily Anne Radford, Papu Sandhu, Aviva L. Poczter, Julia K. Doig, U.S. DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, DC.

JUDGES: Judge Smith would grant the petition for rehearing. Judge Gruender did not participate in the consideration or decision of this matter.

OPINION: Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 9, 2004